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No. 98-665

IN THE

Supreme Court of the United States

October Term, 1998

RICHARD D. SLAUTTERBACK, SANDRA L. SLAUTTERBACK, TRUSTEE, AMERICAN OWNER OPERATOR UNDERWRITERS, INC. and AMERICAN TRUCK UNDERWRITERS HOLDING CORPORATION,
Petitioners,

vs.

IPC MUTUAL INDEMNITY, LIMITED,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The Petitioners incorporate the list provided by Petitioners in the Petition for Certiorari.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

Argument 1

A. The Court's Criteria for Granting Petitions for Certiorari 1

B. Reply to Respondent's Explanation of Why Each of the Issues Presented by Petitioners Does Not Meet the Criteria for Granting Petitions for Certiorari 4

1. "Resolution of the Split among the Circuits" 4

2. Reply to Respondent's "Other Assertions by Petitioners" 5

a. Procedural Background 5

b. Specific State Law Issues 6

1. Tolling Statutes of Limitations 6

2. Statute of Limitations for Mutual Accounts 7

3. Statute of Limitations for Suits Against Fiduciaries 7

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Klehr v. A.O. Smith Corporation, 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997) 4

McLean v. Haden, 214 Ga. App. 413, 448 S.E.2d 69 (1994) 5

Roofing & Sheet Metal Services v. La Quanta Motor Inns, 689 F.2d 982, 989 (11th Cir. 1982) 7

Statutes:

O.C.G.A. § 9-11-9(b) 5

O.C.G.A. § 9-3-96 5

Rules:

Rule 10 1

ARGUMENT

A. The Court's Criteria for Granting Petitions for Certiorari.

Rule 10 provides as follows: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." The rule then lists examples of the character of the reasons for granting certiorari.

The important point is that the grant of certiorari is a matter of discretion and that the discretion is not limited to the examples that follow. Primarily, the discretion is to be exercised in the presence of compelling reasons.

The Respondent states, on page 2, second paragraph, second sentence of its Brief in Opposition: "This Court is not concerned with correcting errors in lower court decisions, but rather with deciding cases which present issues of importance beyond the facts and parties involved." Surely, this case presents issues both compelling and of importance beyond the facts and parties involved.

This case is ***compelling*** because there will be a gross miscarriage of justice if this case is not tried on its facts, with all parties and all contracts to the tripartite alternative to traditional reinsurance program properly within the jurisdiction of the same court. In the trial court below and on appeal the Respondent is being defended and represented by Colonial Penn Insurance Company (under a long-hidden agreement in conspiracy to defraud the Petitioner, which provided for indemnification and a requirement to provide counsel and defend any subsequent

action arising out of the illegal compact), and in fact by the same lawyer used by Colonial Penn in a prior action. Colonial Penn was a party to a suit preceding the instant action, and successfully excluded the joining of Respondent in that prior action, thus preventing the court in that action from obtaining jurisdiction over the other parties to a tripartite arrangement, and preventing the prior action from reviewing in one suit the three related contracts and three contracting parties together. Thus the true relationship among the parties and their roles have never been adjudicated and tried in the same suit. The District Court below differed from the decision of the District Court in the prior case, deciding that there was a tripartite arrangement and three essential, interrelated contracts and parties, i.e., the Petitioners, Colonial Penn and Mutual Indemnity (Respondent). If this case were tried, it might undue the miscarriage of justice Respondent's representative has visited upon the prior court.

In summary, although at first blush from reading the Reinsurance Treaty it appears that Mutual, i.e., the Respondent, is a traditional reinsurer contracting with an insurer, i.e., Colonial Penn, in a traditional reinsurance arrangement, reference to a second agreement, "Shareholder's Agreement," makes it clear that the "reinsurer" is really a Bermuda rent-a-captive under their program of alternative to traditional reinsurance, because the Shareholder's Agreement provides that 90% of premium dollars be paid over to the Petitioners, and none retained by Respondent, who merely receives a fee for acting as a fiduciary or escrow agent in administering the money that merely passes through its hands, i.e., the Respondent merely acts as an escrow agent and as a fiduciary for the benefit of the Petitioners, and the Petitioners, in effect, are self-insured, which is the objective of the Bermuda "rent-a-captive" alternative to traditional reinsurance program for which the Respondent declares to the world on its World Wide Web sites and on the

prospectus it has filed with the SEC and the New York Stock Exchange. Respondent is a Bermuda corporation formed for the sole purpose of acting as a fee only captive insurance company to be "rented" for the purpose of allowing the producer of business to obtain the underwriting profits otherwise going to a traditional reinsurer.

This case is ***of importance beyond the facts and parties involved*** because there is no United States case law on "rent-a-captives," which is what the Respondent has declared to the world that it is. Vermont is the only state considering legislation on rent-a-captives, i.e., the renting of an existing captive insurance company by a producer of insurance business for the purpose of self-insurance or at least an alternative to traditional reinsurance.

Industry statistics show that 50% of all U.S. premium dollars are now placed in rent-a-captive arrangements of this kind, i.e., alternative to traditional reinsurance arrangements, i.e., meaning in fact no reinsurance, but, rather, a mechanism for self-insurance. Respondent has grown into a giant since this transaction, now showing several billions in assets. Respondent has the following World Wide Web addresses: www.comrisk.com; www.mutrisk.com; www.producersforum.com; and www.accessmrm.com, explaining the nature of a rent-a-captive and Respondent (Mutual Indemnity, Respondent herein).

A Supreme Court decision on the proper construction and interpretation of the Bermuda rent-a-captive, alternative to traditional reinsurance, and the role of the various parties to the tripartite set of contracts would prevent the conversion of millions of dollars by the usurping party and the miscarriage of justice, as in this case.

B. Reply to Respondent's Explanation of Why Each of the Issues Presented by Petitioners Does Not Meet the Criteria for Granting Petitions for Certiorari

1. "Resolution of the Split Among the Circuits"

Petitioners believe that Respondent's dissertation on RICO is distracting for the Court. The reason for citation of *Klehr v. A.O. Smith Corporation*, 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997) was to argue the importance of considering the fraudulent concealment by the defendant of the acts giving rise to the cause of action, with the subsequent recitation of facts showing the active concealment by the defendant, Respondent, of its secret arrangement with the fronting company, Colonial Penn, and its consummation of a conspiracy to defraud the Petitioners out of their rightful profits under the tripartite set of contracts involving Petitioners, Colonial Penn and Respondent.

The gist of the argument of Petitioners in the court below and in its Petition was that a cause of action cannot arise until the facts constituting a prima facie case supporting such a cause of action are known to the damaged party. It was alleged below that the Respondent in conspiracy with the fronting company, Colonial Penn, made false reports to the Petitioners, which it falsely represented as being audited, and that Respondent made false reports to the government of Bermuda, in order to intentionally hide the truth from the Petitioner. Petitioner also argued in the District Court and at the Court of Appeals that Colonial Penn, in representing Respondent, also withheld information demanded by discovery process, in order to prevent the Petitioner discovering the truth and in active or fraudulent concealment, tolling the statute of limitations.

2. Reply to Respondent's "Other Assertions by Petitioners"

a. Procedural Background

Appendix H to the Petition, Motion for Rehearing and Suggestion of Rehearing En Banc, page 103a, states:

> The District Court found that the breach of contract occurred in December 1987 with the execution of the rescission agreement between Colonial Penn and Mutual Indemnity. (R. 82, p. 18) Although AOO suspected that there was "something bad wrong" in 1986, it had not been able to discover any tangible evidence of what fraudulent acts had been committed until March of 1989, when the secret rescission agreement was produced during discovery, (R. 82, p. 27).
>
> In Georgia, allegations of fraud must be "stated with particularity", O.C.G.A. § 9-11-9(b). Thus, unless AOO could have stated in its complaint fraud with "specificity", the suit would have dismissed, *McLean v. Haden*, 214 Ga. App. 413, 448 S.E.2d 69 (1994). The District Court also found that Mutual Indemnity concealed the existence of the rescission agreement from AOO until March 1989. Thus due to Mutual Indemnity's fraud the statute of limitations could not have begun to run until that date, and the suit was timely filed. O.C.G.A. § 9-3-96.

Thus the record is clear that the District Court erred in counting backwards to the December 1987 date of execution of

the rescission agreement, especially when the court found that the Petitioner did not have knowledge until the agreement was produced in March of 1989.

The Respondent's bottom of page 5 characterization of the effect of the Court of Appeals denial of appeal without opinion is without merit. The court is compelled to apply the appropriate law without regard to when it becomes aware of that law.

b. Specific State Law Issues

1. Tolling Statutes of Limitation

The Order of the District Court granting summary judgment, Exhibit C to the Petition, cites as the only evidence of "actual knowledge" on the part of the Petitioners of the fruad of the Respondent prior to Petitioners' receipt of the secret rescission of the reinsurance agreement is a statement made by Petitioner Slautterback in deposition quoted in the Order (page 23a, Exhibit C of the Petition): "A. We were aware right after the shareholder meeting in 1986 that there was something bad wrong. . .." That feeling is not sufficient to form the basis of a cause of action for fraud, and any case brought on such a hunch would have been thrown out of court. Thus the District Court abused its discretion in concluding that this quote constituted "actual knowledge" of the fraudulent conduct of the defendant, and it is that "actual knowledge" that was the basis of the District Court's decision that the statute of limitations was not tolled. The rest of the quote: ". . . the fidelity was not there, but we could not . . . make an allegation or file a suit without something tangible in hand." "The fidelity was not there," was all that Slautterback meant.

By entering into the secret rescission, escrow and indemnification, and hold harmless agreement with Colonial Penn and by redeeming Petitioners' stock without authority from Petitioner (R. 70, Ex. 10, 11), Respondent not only breached its duty of good faith, but also defrauded Petitioner by concealing this self-dealing from Petitioner until it was discovered in 1991 (R. 70, Ex. 11). This confidential relationship thus acts to toll the statute of limitations from beginning to run until 1991.

2. Statute of Limitations for Mutual Accounts

Petitioners appeal to the Court to consider the theory of mutual accounts, for the reasons set forth above under A, the Court's Criteria for Granting Petitions for Certiorari, in that clearly this is a case wherein summary judgment on the statute of limitations would be a miscarriage of justice under *Roofing & Sheet Metal Services v. La Quanta Motor Inns*, 689 F.2d 982, 989 (11th Cir. 1982). The Petitioners make an effective argument in the Petition for considering the accounts between Respondent and Petitioner as "mutual accounts," providing for the application of the longer statute of limitations.

3. Statute of Limitations for Suits Against Fiduciaries

Respondent wrongfully characterizes the relationship between Respondent and Petitioners as debtor and creditor respectively. The role of Respondent under the Shareholder's Agreement was that of an escrow agent. The Respondent was to hold the funds deposited by Petitioner, act as a fiduciary or trustee in the accounting and disbursement of those funds, to invest those funds on behalf of Petitioners and otherwise to act as a trustee for the benefit of the Petitioners, eventually

distributing those funds in the account back to the Petitioners. The premiums were to be held and invested for the benefit of Petitioners, the amounts declared by Petitioners as needed for the payment of claims paid over to Petitioners, and the balance or underwriting profit paid over to the Petitioners. That is the essence of a fiduciary relationship.

Under the theory of constructive trust, the Respondent states that the duty of utmost good faith is not owed the Petitioners in this instance in that the Petitioners were not the ceding insurer nor reinsurer. The fact and the law is that the Petitioners were both. Colonial Penn, the ostensible insurer was under the tripartite arrangement of contracts merely a fronting company with the risk taker and insurer the Petitioner. The Respondent was a rent-a-captive, a mere fee based entity acting in the capacity of an escrow agent, with consideration for the reinsurance, all premiums not paid out in claims, going to the Petitioners. All this is spelled out plainly and in detail in the contracts. But the matter is not to be decided by the court as a matter of law, but rather a matter of fact for the jury.

The point is that the Respondent is misrepresenting to the Court the role of the parties when Respondent states that the Petitioner was neither insurer nor reinsurer, and thus not entitled to utmost good faith and that no constructive trust arises out of the relationship of the parties. That is why the three parties and three contracts must be reviewed by the same court, and that this case must go to trial to prevent a gross miscarriage of justice.

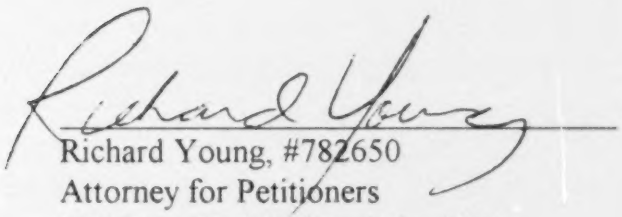
Bermuda law developed the concept of the rent-a-captive, and all three parties were quite aware of the arrangement made binding through a set of three inter-related

contracts with a captive insurance company established under Bermuda law that allowed itself to be "rented" to facilitate the producer of the insurance business, i.e., the Petitioner, to obtain the underwriting profits if an arrangement with a fronting company, i.e., Colonial Penn, would allow the producer to write policies with the permission of the fronting company for a total consideration of a fee. When the business became enormously profitable, the fronting company wished to take over the business of the Petitioner, and the events giving rise to this litigation began.

CONCLUSION

This case clearly meets the criteria for the Court to exercise its discretion to grant certiorari in that this case presents issues both compelling and of importance beyond the facts and parties involved. The Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,



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